4-23-1976

John A. Morgan v. Blout Brothers Corporation and USF & G Insurance Company and Workmen's Compensation Board

Appellee's Brief 1976-SC-0131

APPELLEE'S BRIEF

SUPREME COURT OF KENTUCKY

File No. 76-131

JOHN A. MORGAN - - - - - - Appellant

versus

BLOUNT BROTHERS CORPORATION and
USF&G INSURANCE COMPANY and
WORKMEN'S COMPENSATION BOARD - Appellees

APPEAL FROM JEFFERSON CIRCUIT COURT
CIVIL ACTION No. 194646
COMMON PLEAS BRANCH, SIXTH DIVISION
HONORABLE J. PAUL KEITH, PRESIDING

BRIEF FOR APPELLEES

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In compliance with RAP 1.250, this is to certify that a copy of this Brief was served upon Messrs. Harris J. Berman and Ralph G. Stone, Attorneys for Appellant; Mr. William L. Huffman, Director, Workmen's Compensation Board, and Honorable Curtis G. Witten, Circuit Judge, in the manner provided by CR 5.02.

Of Counsel for Appellees

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TABLE OF CONTENTS AND AUTHORITIES

STATEMENT OF QUESTION PRESENTED

Was Morgan's evidence of such probative force as to preclude the Board from finding that his refusal to summit to an operation was unreasonable under provisions of KRS 342.035(2)?

SUPREME COURT OF KENTUCKY

File No. 76-131

JOHN A. MORGAN - - - - - *Appellant*

v.

BLOUNT BROTHERS CORPORATION and
USF&G INSURANCE COMPANY and
WORKMEN'S COMPENSATION BOARD - - *Appellees*

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BRIEF FOR APPELLEES

May it please the Court:

COUNTERSTATEMENT OF THE CASE

A. Statement of the Nature of Proceedings.

This is a workmen's compensation claim which is before the Court on appeal from an order of the Jefferson Circuit Court entered on November 6, 1975 dismissing Morgan's appeal to the Trial Court. The Trial Court affirmed the Opinion, Order and Award of the Workmen's Compensation Board rendered on November 18, 1974 which Opinion is included herein as an Appendix.

The evidence before the Workmen's Compensation Board consists of the testimony of Morgan given at the hearing on November 11, 1974, and the deposition of Dr. Leonard Goddy taken on February 12, 1974 as Morgan's medical proof.

The issue before this Court is the reasonableness of Morgan's refusal to submit to an operation for the removal of a bone chip from his wrist.

B. Statement of Facts.

Morgan injured his wrist while working for Blount on April 2, 1973 as a carpenter. He was initially seen by a Dr. Bowles. Dr. Bowles had a heart attack and an appointment was made for Morgan to be seen by Dr. Goddy, an orthopedic surgeon (T.E., p. 15). Dr. Goddy released Morgan for work on July 9, 1973 and Morgan worked that day and was laid off, and again returned to work on September 11, 1973 (T.E., pp. 16, 17 and 18).

Morgan's employment as a carpenter since the accident includes work for General Exhibiting Corporation in the Bashford Manor Mall; Turner Construction Company, where he put up overhead insulation; and Quality Paving Company, where he constructed building forms (T.E., pp. 32, 34 and 35). Also he has set fixtures for the TG&Y store on West Pages Lane (T.E., pp. 37 and 38).

Morgan complained that although he was working he was not able to do his job as well following the accident and that he had problems doing carpentry work.

Dr. Goddy diagnosed Morgan's symptoms to be the result of a bone chip in the area of the wrist. The chip was estimated to be from an eighth to a quarter inch in diameter (Dr. Goddy's deposition, p. 13). Dr. Goddy recommended that the bone chip be removed and described the procedure of removal as involving an incision over the wrist, locating the chip and removing it. The doctor stated that the risk to Morgan would be less than that involved in an appendectomy (Dr. Goddy's deposition, p. 14). Dr. Goddy states that he would not use a general anesthetic but that an auxiliary block would be employed which is a kind of local anesthetic which numbs the nerves at the shoulder for the entire arm (Dr. Goddy's deposition, p. 14). The healing process would be anywhere from two to four weeks with an outside possibility of six weeks. Hospitalization would be for a period of two days with three days the maximum (Dr. Goddy's deposition, p. 14).

Dr. Goddy states that his clinical examination of the plaintiff revealed no limitation of range of motion, strength, or evidence of atrophy, or wasting of muscle tissue on the right wrist. However, he states that on the basis of plaintiff's subjective complaints he would rate the plaintiff as having a disability of 12% to the body as a whole, with the chip, because he is a right-handed individual (Dr. Goddy's deposition, p. 11).

Dr. Goddy testified that the removal of the chip would markedly reduce the plaintiff's pain if not completely eliminate it (Dr. Goddy's deposition, p. 12). He states that after the removal of the chip he would

not expect any significant impairment (Dr. Goddy's deposition, p. 13).

During the course of the doctor's deposition, the offer of the operation was submitted to plaintiff (Dr. Goddy's deposition, p. 14). This was on February 12, 1974. Subsequent written offers or motions were filed by the employer with the Board. To date Morgan has not agreed to submit to the removal of the bone chip.

ARGUMENT

Morgan's Evidence Was Not of Such Probative Force as to Preclude a Finding by the Board That He Should Submit to the Operation.

The test or criteria on appeal for this case has been stated by the Court in the case of *Salyers* v. *Wilputte Coke Oven Division, Allied Chemical Corp.*, 447 S. W. 2d 644 (1969). The Court describes this as follows:

> ". . . Counsel for the employer correctly observes that the question is not whether the board's finding was supported by substantial evidence, or whether it could have found otherwise, but whether the claimant's evidence was of such probative force as to preclude a finding against him. Clearly, we think, it was not. Cf. Columbus Mining Co. v. Childers, Ky., 265 S. W. 2d 443, 445 (1954); Lee v. International Harvester Company, Ky., 373 S. W. 2d 418, 420 (1963)."

The Board's opinion found that Morgan unreasonably refused to submit to surgical treatment for the removal of the bone chip. The uncontradicted medical

evidence establishes that the procedure and treatment outlined by Dr. Goddy is of a minor nature.

The offer of the surgery has been pending since February 12, 1974 when Dr. Goddy made his recommendation (Dr. Goddy's deposition, p. 12). There has been no acceptance of the offer by Morgan. KRS 342.035(2) provides as follows:

> "Where such requirements are furnished by a public hospital or other institution, payment thereof shall be made to the proper authorities conducting it. No compensation shall be payable for the death or disability of an employee if his death is caused, or if and in so far as his disability is aggravated, caused or continued, by an unreasonable failure to submit to or follow any competent surgical treatment or medical aid or advice."

This section of the statute has been construed by this Court in numerous decisions, including *Gennett Lumber Company* v. *Sizemore,* Ky., 441 S. W. 2d 429 (1969); *Hefley* v. *E. I. duPont deNemours & Company,* Ky., 424 S. W. 2d 396; and *Commonwealth, Department of Highways* v. *Lindon,* Ky., 380 S. W. 2d 247.

In the *Gennett* case, this Court held it was unreasonable for the employee to refuse to submit to removal of an intramedullary pin in his left femur; in the *Hefley* case, it was held to be unreasonable to refuse to submit to knee surgery to be performed under a general anesthetic; and in the *Lindon* case, it was held to be unreasonable to refuse to submit to psychiatric treatment.

As in the *Gennett* case, the medical testimony here is uncontradicted. It establishes that corrective surgery is desirable, has been recommended, and that the operation would not endanger life and health. The prospects for success are good, and this would expedite Morgan's chances for lessened disability. The statutory language is plain. If Morgan does not wish to submit to the operation offerred, then he must be prepared to forego his claim for workmen's compensation benefits.

The argument advanced in appellant's brief seems to be that the Board is estopped to change an interlocutory order even if the Board believes the order to be erroneous. Not only does this argument seem palpably fallacious, but it ignores the fact that Morgan is suffering no harm that cannot be alleviated by his own decision. If he were to have the bone chip removed from his wrist, he is likely to have no significant impairment at all (Dr. Goddy's deposition, p. 13). In fact, Morgan is able to work and he has worked throughout periods of this proceeding. If he wishes to continue working with pain in his wrist, that is his choice. But it would be most unfair to require Blount to pay for the disability he has as a result of his decision.

CONCLUSION

Morgan's decision to not submit to surgery for the removal of the bone chip is not supported by evidence of such probative force as to preclude a finding against him. In fact, it is not supported by any evidence. The probative force of the evidence establishes that Morgan's refusal to have the bone chip removed is unreasonable and ill advised. The judgment below should be affirmed.

Respectfully submitted,

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APPENDIX

WORKMEN'S COMPENSATION BOARD

#1000086

JOHN A. MORGAN - - - - - - - *Plaintiff*

v.

BLOUNT BROTHERS CORPORATION - - - *Defendant*

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OPINION, ORDER AND AWARD
November 18, 1974

OPINION, ORDER AND AWARD
BY: SHELBY T. DENTON, *Chairman*

FINDINGS OF FACT

1. As stipulated, leaving for determination of the Board the extent and duration of disability, if any, and the further question of whether plaintiff has unreasonably refused to submit to competent surgical treatment (KRS 342.035(2)).

2. By reason of the work-related accident of April 12, 1973, plaintiff became temporary totally disabled from said

date to September 19, 1973. The defendant shall be given credit for 4 6/7 weeks (34 days) which plaintiff worked during said period of temporary total disability. No permanent partial disability benefits will be awarded at this time for the reasons as set out in 3 below.

3. At the taking of Dr. Goddy's deposition, the only medical evidence introduced in this claim, the gist of his testimony was that a small bone chip in plaintiff's wrist resulted in plaintiff's complaints of pain. He recommended that it be removed and that said medical procedure would be simple and of practically no risk to plaintiff.

At the taking of Dr. Goddy's deposition, the defendant tendered the operation and requested that plaintiff submit to said operation as suggested by Dr. Goddy.

On April 15, 1974, the defendant filed a motion for an order directing plaintiff to submit to the operation and in the event plaintiff refused to submit to same his claim for disability benefits be denied. In response to defendant's motion the plaintiff filed an affidavit where through counsel he stated that he desired to consult other physicians or surgeons in order to determine the advisability of the proposed operation.

Believing that plaintiff would obtain other medical advice as to the proposed operation, the Board overruled defendant's motion filed April 15, 1974. The plaintiff has not introduced in to the record any evidence of further advice he intended to obtain (as set out in his affidavit filed April 18, 1974), therefore, the Board is of the opinion that plaintiff has unreasonably refused to submit to competent surgical treatment and is not entitled to further benefits.

4. Should the plaintiff later submit to said operation, then this claim can be reopened pursuant to KRS 342.125 to determine the extent of plaintiff's permanent partial disability, if any.

RULINGS OF LAW

KRS 342.020 KRS 342.035(2) KRS 342.730

ORDER AND AWARD

IT IS THEREFORE, ORDERED AND ADJUDGED BY THE FULL BOARD AS FOLLOWS:

1. Plaintiff, John A. Morgan, is awarded and shall recover of the defendant, Blount Brothers Corporation, and/or its insurance carrier, the sum of $81.00 per week from April 2, 1973, to September 19, 1973, as temporary total disability benefits, with credit to be given to the defendant for 4 6/7 weeks thereof; together with interest at the rate of 6% per annum on all past due and unpaid installments of such compensation, and said defendant shall take credit upon this award for any such compensation heretofore paid to plaintiff.

2. Plaintiff is awarded and shall recover of the defendant, Blount Brothers Corporation, and/or its insurance carrier, such medical, surgical and/or hospital expenses as may be reasonably required for the cure and treatment of his injury.

3. That weekly disability benefits be discontinued until such time that plaintiff submits to competent surgical treatment as set out in the Findings of Fact above.

FULL BOARD CONCURRING